No. 87-1302

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN GUSHIKEN, RODNEY KIM AND NICK TEVES, JR., IN THEIR RESPECTIVE CAPACITIES AS EMPLOYER TRUSTEES OF THE PECA-IBEW VACATION & HOLIDAY SUPPLEMENTARY UNEMPLOYMENT BENEFIT, AND ANNUITY FUNDS,

Petitioners,

v.

THOMAS FUJIKAWA, IN HIS CAPACITY AS UNION TRUSTEE OF THE PECA-IBEW VACATION & HOLIDAY, SUPPLEMENTARY UNEMPLOYMENT BENEFIT, AND ANNUITY FUNDS,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GILL, PARK,
PARK & KIM
Attorneys at Law

THOMAS P. GILL*
T. ANTHONY GILL
Suite 500
707 Richards Street
Honolulu, HI 96813
(808) 536-3905
Attorneys for
Respondent
*Counsel of Record

QUESTIONS PRESENTED

1. Whether a fiduciary, who is a union trustee of various trusts established under the Employee Retirement Income Security Act of 1974 (ERISA), may file a civil action requesting declaratory and injunctive relief under Section 502 of the Act, 29 U.S.C. § 1132, against employer trustees who were alleged to be violating their fiduciary duties by refusing to sign benefit checks for striking employee/beneficiaries, without first exhausting an arbitration procedure set forth in the trust documents.

2. Whether the Circuit Court of Appeals for the Ninth Circuit was correct in finding that exhaustion of internal dispute procedures is not required where the basic issue was whether a violation of the terms or provisions of ERISA had occurred.

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Respondent requests that no writ of certiorari issue in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 823 F.2d 1341. The opinion of the District Court is unreported. Both opinions are included as Appendix A and B of the petition.

JURISDICTION

Petitioners invoke jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), and, presumably, in accord with Rule 17 of the Supreme Court Rules.

STATUTES INVOLVED

The statutes involved in this case include: 29 U.S.C. § 186; 29 U.S.C.

§ 1001 et seq., (ERISA) and in particular, 29 U.S.C. §§ 1104, 1105, 1109 and 1132.

STATEMENT OF THE CASE

A. Factual Background

This case arose out of a dispute between the union and employer trustees of several trust funds established by a multi-employer association, Pacific Electrical Contractors Association (PECA), and the union, International Brotherhood of Electrical Workers, Local 1186, AFL-CIO (IBEW). The funds directly involved in the motions filed in the litigation below were the Supplementary Unemployment Benefit Fund (SUB); and the Vacation and Holiday Fund.

The basic cause of the dispute was an electrical workers' strike during the

last third of 1984. The collective bargaining agreement between the IBEW and PECA had expired on August 14, 1984, and a strike was called on September 10, 1984, against some of the employers who were members of PECA.

Starting in September 1984, after commencement of the strike, two of the employer trustees, Rodney Kim and John Gushiken, who had been previously authorized to sign benefit checks for the SUB and Vacation and Holiday Funds respectively, refused to sign a large number of benefit checks prepared by the Funds' Administrative Office. The checks had been prepared according to the Administrative Office's normal procedures. In so doing, the employer trustees prevented earned and funded

benefits, Appendix at A-5 - A-8, from being paid to the beneficiaries claiming them.

The present action was filed by Fujikawa, a union trustee of both funds, in his capacity as a fiduciary. Employer trustees Kim and Gushiken, Defendants and Petitioners herein, were also fiduciaries of their respective funds. There were no claimants or beneficiaries directly involved as parties. The action requested declaratory and injunctive relief and punitive damages. The strike ended with a new contract being signed in early January, 1985, which contract has subsequently expired on August 14, 1987, and the parties are currently in negotiations.

Respondent Fujikawa, a union trustee, is and was the business manager/financial

secretary of the IBEW. Employer trustee Kim is and was executive director of PECA and Gushiken is the owner of one of the electrical contracting companies represented by PECA which was being struck by the IBEW in 1984 at the time of his refusal to sign.

The Respondent's position is that the employer trustees refused to sign benefit checks in order to deny monetary benefits to striking employees, and thus improve PECA's bargaining position. Respondent alleges that this refusal to sign was a violation of ERISA because the employer trustees were violating their fiduciary duty by acting in the interest of the employers in a labor dispute, rather than solely in the interest of participants and beneficiaries of the funds as

required by 29 U.S.C. §§ 1103(c)(1) and 1104(a)(1)(A) and (B).

The employer trustees offered several reasons for their action, which reasons varied over time. First, the employer trustees claimed that there had to be a meeting of the fund trustees to decide whether the claimed benefits should be paid during the strike. At the meetings, the employer trustees then claimed that benefits could not be paid in the absence of a collective bargaining agreement. After fund counsel issued an opinion which contradicted the employer trustees' position, they then claimed that they needed to examine the documentation in regard to the various claims.

The employer trustees' Motion for Summary Judgment asked the District Court to dismiss the lawsuit and require that

the matter be submitted to internal procedures.

The union trustee's Countermotion for Partial Summary Judgment requested denial of the employer trustees' Motion and an Partial Summary Judgment in the union trustee's favor.

After the strike ended on or about January 3, 1985, and a new collective bargaining agreement was ratified, the employer trustees signed the contested benefit checks for most of the beneficiaries who had waived their personal rights to sue those trustees.

B. Legal Questions Involved

Respondent Fujikawa, plaintiff in the District Court action, did not sue as a claimant, but rather as a trustee and fiduciary. He asked for equitable

injunctive and declaratory relief and for punitive damages under 29 U.S.C. § 1132(a)(2) and (a)(3)(A) and (B).

Petitioners, Defendants below, have attempted to justify their refusal as trustees to co-sign benefit checks on the ground that the contract had expired and therefore the beneficiaries were no longer "employees" under the trust agreements, and were not entitled to benefits, even though such benefits had been funded and were available for payment. Petitioners then claimed that this dispute was "deadlocked" and therefore had to be arbitrated. Petitioners' ultimate defense then became that the arbitration procedures had to be exhausted before suit could be brought.

The District Court bought Petitioners' argument. The Ninth Circuit

did not, remarking that the Petitioners' apparent claim that striking workers were not "employees" ". . . appears at first impression to be frivolous." Fujikawa v. Gushiken, et al., 823 F.2d 1341, 1348 (9th Cir. 1987). See, Pet. Appendix at A-33.

The initial legal issue is whether this case involves a breach of fiduciary duties which is a violation of ERISA and thus a matter for the Court to decide, or whether it is merely a disputed claim for benefits which should first be arbitrated.

We note, in passing, that Petitioners continually refer to this matter as a "claim" which "ultimately relied on interpretation and application of the Plan documents." This phrase, or a

variant of it, is repeated some eighteen times in the course of the petition. If mere repetition adds substance, then certainly Petitioners are presenting a very weighty case.

SUMMARY OF ARGUMENT

Respondent submits that this is not a proper case for the granting of a writ of certiorari in that the Ninth Circuit has not "rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Sup. Ct. R. 17.1(a). Petitioners' attempt to cloud the issue by phrasing it as though it were merely a disputed claim by a beneficiary does not alter the Ninth Circuit's holding. The employer trustees mixed their fiduciary and employer hats

and used the ERISA trusts as a strike weapon. Petitioners have not cited any other circuit decision involving similar facts and circumstances which reached a different result.

Respondent further argues that the Ninth Circuit's decision is in accord with this Court's decisions which distinguish the enforcement of statutory rights from those cases where it is appropriate to defer to arbitration.

ARGUMENT

A. This is an action to interpret and enforce statutory rights under ERISA.

Section 404 of ERISA, 29 U.S.C. § 1104, provides in pertinent part:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with

> respect to a plan solely in the interest of the participants and beneficiaries and-
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) Defraying reasonable expenses of administering the plan;

When Petitioner Gushiken refused to sign holiday checks which were accrued, funded, and payable under the terms of the plan, see Appendix at A-6, merely because the beneficiaries were on strike, and where Gushiken was an employer who was being struck, there is at least a strong presumption that he had something in mind other than the welfare of the beneficiaries.

Similarly, when Petitioner Kim refused to sign SUB checks when eligibility was clear, being dependent on

eligibility for state unemployment benefits, see, Appendix at A-9, and Kim is the executive secretary of the employer organization, PECA, which was being struck, it is difficult to accept some fanciful rationale that the beneficiaries were not eligible because they were not "employees". See, "Continuation of Trust," Appendix at A-2.

The subsequent payment of the benefits, after the strike was settled, providing the beneficiary waived the right to sue the employer trustees, would indicate something more than mere concern for the terms of the trust agreement. See, 823 F.2d 1341, 1344, Pet. Appendix at A-13.

The legislative history of ERISA makes it clear that it was intended to allow enforcement of fiduciary duties.

> In addition to being able to request the Secretary of Labor to bring suit on their behalf in cases where benefits are denied in violation of the act, individual participants and beneficiaries will also be able to bring suit in Federal court in such instances, as will as to obtain redress of fiduciary violations. (Emphasis added.)

120 Cong. Rec. 29, 933 (1974) (Statement of Senator Williams).

Respondent Fujikawa was required by ERISA to attempt to remedy the breach. ERISA § 405, 29 U.S.C. § 1105, relating to liability for the breach of co-fiduciary, states in pertinent part:

> (a) Circumstances giving rise to liability
>
> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the

> same plan in the following circumstances:
>
> * * *
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

This duty was recognized by the Ninth Circuit. 823 F.2d 1346, Pet. Appendix at A-26.

In short, it would seem fairly obvious that Petitioners here would shroud their blatant use of ERISA trust funds as a strike weapon in the mists of arbitrability and thus escape being held accountable for a violation of the statute. This process has the additional benefit to the employers of preventing any immediate injunctive remedy as well as reducing or eliminating the risk of

judicial sanctions when they use the same tactic in a subsequent labor dispute.

We find it hard to believe that ERISA was enacted with this result in mind.

B. The various circuits have recognized the difference between judicial enforcement of statutory rights and arbitration of the meaning of contracts or trust documents.

The Ninth Circuit has recognized this difference in two recent cases, Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) and Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984). In Amato, cited by Petitioners, the Ninth Circuit required arbitration where the central question was the amount of pension credits due a claimant who had a break-in-service.

In Amaro, not cited by Petitioners, the Ninth Circuit allowed judicial

enforcement of statutory rights under ERISA § 510, 29 U.S.C. § 1140, where the issue was laying off employees in order to prevent their obtaining necessary years of service to qualify for pension and welfare benefits. The Court clearly separated statutory from contractual rights and stated that to hold otherwise would mean that an ERISA claim

> ". . . could be defeated without the benefit of the protections inherent in the judicial process." (Cites omitted.)

724 F.2d at 750.

The Ninth Circuit, citing the Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), also observed that:

> The resolution of statutory issues "is a primary responsibility of the courts," not arbitrators.

The Ninth Circuit went on to point out:

> Section 502 of ERISA, 29 U.S.C. Section 1132, which provides for civil enforcement of the Act, is silent on the exhaustion doctrine being a prerequisite to an ERISA action.

724 F.2d at 750.

This vital distinction has been observed by other circuits as well.

The Third Circuit, one of those cited by Petitioners as being contrary to the Ninth Circuit, Petition at 11, n.4, made a similar distinction in Delgrosso v. Spang & Company, 769 F.2d 928 (3d Cir. 1985). There the court found that participants in a pension plan who sought to prevent the diversion of surplus assets by the company, could sue under ERISA without exhausting the arbitration remedy, even though the question turned

on an interpretation of the pension agreement. 769 F.2d at 932. The Third Circuit went on to observe:

> Because the reach of the arbitration clause cannot encompass the claims made by Delgrosso, Delgrosso cannot be compelled to exhaust contractual arbitration remedies under the Pension Agreement and Delgrosso may properly seek relief in the federal courts.

769 F.2d at 933.

We submit that Delgrosso is on all fours with the Ninth Circuit's ruling in the present case. Incidentally, certiorari was denied by the Supreme Court. Spang & Co. v. Delgrosso, 476 U.S. 1140 (1986).

This distinction between statutory and contractual rights was also upheld by the Third Circuit in another case cited by Petitioners, Barrowclough v. Kidder,

Peabody & Co., Inc., 752 F.2d 923 (3d Cir. 1985).

Similarly, in Viggiano v. Shenango China Division of Anchor Hocking Corp., 750 F.2d 276 (3d Cir. 1984), the Third Circuit, though requiring arbitration of whether the employer was required to continue payment of premiums for a hospitalization plan during a strike, recognized the distinction between statutory and contractual rights, and distinguished the Supreme Court's decision in Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984).

We also suggest that Petitioners' citation of Wolf v. National Shopmen Pension Fund, 728 F.2d 182 (3d Cir. 1984), is inappropriate. The court there required "claim" exhaustion, but went on

to find, under ERISA, that the trustees' action in denying the claim was arbitrary and capricious.

In our case, Respondent is not making a "claim"; he is raising the statutory question of breach of fiduciary duties by the employer trustees.

Petitioners would also show a conflict with the Ninth Circuit by citing a Fifth Circuit case, Denton v. First National Bank of Waco Texas, 765 F.2d 1295 (5th Cir. 1985). We suggest this is less than accurate. In Denton, the claimant was seeking a lump-sum payment of his pension benefits. The Fifth Circuit, citing the Ninth Circuit in Amato, and the Second Circuit in Morse v. Stanley, 732 F.2d 1139 (2d Cir. 1984), found that the court should not intervene

in this type of case unless the action of the trustees was arbitrary and capricious. This hardly seems inconsistent with the Ninth Circuit, particularly since they cite Amato. Further, the Fifth Circuit in Denton recognizes the same distinction between the statutory enforcement of fiduciary duties and the trustees' right to interpret the contract in a claim case. 765 F.2d at 1301.

Petitioners then move to the Seventh Circuit and cite Challenger v. Local 1, International Bridge, Structural & Ornamental Ironworkers, 619 F.2d 645 (7th Cir. 1980). This case involved the interpretation of a break-in-service provision in a pension plan, with no allegation of any breach of fiduciary

duties under ERISA. We suggest this is an inappropriate citation, given the facts and allegations of the present case.

After citing the Ninth Circuit Amato case, Petition at 12, n.4, to show differences of other circuits with the Ninth Circuit, Petitioners make their final citation Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985). Mason was a suit over closing of a plant, alleging violation of a contract and the union's failure to represent. The complaint was subsequently amended to claim that the employer violated ERISA by using certain computer programs in connection with its pension plan. No grievances were filed under the contract, or under the pension plan procedures.

The court required prior exhaustion of procedures under the contract and the pension plan, citing the Seventh Circuit in Kross v. Western Electric, 701 F.2d 1238 (7th Cir. 1983) and the Ninth Circuit in Amato. The court noted the Ninth Circuit's distinction in Amaro. Mason, 763 F.2d at 1226. The Supreme Court denied certiorari in this case. Mason v. Continental Group, Inc., 474 U.S. 1087 (1986).

We fail to understand how Petitioners can claim that Mason, with widely different facts, can set up a conflict with the Ninth Circuit, when Mason relies on Amato, a Ninth Circuit case.

We suggest that the Petitioners' attempt to justify a writ of certiorari in this case is less than convincing.

C. The Ninth Circuit's position in the present case is consistent with those taken by the Supreme Court in similar cases.

It would be presumptuous to cite the Supreme Court to itself, and we do not intend to do so. However, this Court has given ample guidance in the past to the basic concepts which are involved in the present case.

In NLRB v. Amax Coal Co., 453 U.S. 322 (1981), this Court pointed out the necessary separation between the duties of a trustee and those of the appointing party.

> In sum, the duty of the management-appointed trustee of an employee benefit fund under section 302 (c)(5) is directly antithetical to that of an agent of the appointing party.

453 U.S. at 331-32.

> The language and legislative history of Section 302 (c)(5) and ERISA therefore demonstrate

> that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.

453 U.S. at 334.

In the present case, these admonitions seem to have escaped the Petitioners.

In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), this Court made clear that an employee's statutory rights - in that case under Title VII of the Civil Rights Act - were distinctly separate from that employee's contractual rights, including arbitration. We suggest a similar right to court enforcement of fiduciary duties under ERISA should be upheld in the present case.

In Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), this

Court applied a similar rule to the statutory rights given employees under the Fair Labor Standards Act. 29 U.S.C. § 201, et seq. Those rights could not be subjected to contractual arbitration. The Court made its basic distinction between contractual and statutory rights:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

450 U.S. at 737.

More recently, in Schneider Moving & Storage, 466 U.S. 364 (1984), this Court

did not apply the "presumption of arbitrability" to disputes between trustees and employers, even if those disputes raised questions of interpretation under the collective bargaining agreements. 466 U.S. at 372. While Schneider dealt with the right of trustees to collect trust fund contributions from employers, and not with the attempt of one trustee to enforce the fiduciary duty provisions of ERISA against another trustee (who was, incidentally, a struck employer), we suggest that the underlying concept of a trustee's right and duty to take legal action to protect the trusts without being subjected to arbitration, is similar. See Appendix at A-1.

Similarly, in Clayton v. Automobile Workers, 451 U.S. 679 (1981), this Court

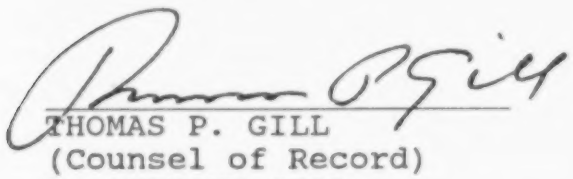
did not require an employee to exhaust internal union appeal procedures which were inadequate to award the full relief sought under § 301 of the LMRA, or would unreasonably delay a judicial hearing on the merits of his case. In the present case, all an arbitration proceeding would have achieved was delay so that the employers could succeed in using the trust funds as a strike weapon. Even if ultimately successful, those procedures would not have granted the injunctive and equitable relief required to prevent future misuse of the funds by the employer trustees, such as could now occur under the currently expired contract.

CONCLUSION

Based on the foregoing, we submit that the decision of the Ninth Circuit in this case was not in conflict with rulings in other circuits, and is in accord with prior holdings of this Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

GILL PARK PARK & KIM
Attorneys at Law



THOMAS P. GILL
(Counsel of Record)
T. ANTHONY GILL

Attorneys for Respondent
Thomas Fujikawa

APPENDIX A

PECA-IBEW VACATION & HOLIDAY FUND
DECLARATION OF TRUST AGREEMENT

ARTICLE VI

Duties and Powers of Trustees

* * *

Section 2 Powers. Except as otherwise provided by law, the trustees may:

* * *

o. Maintain Legal Proceedings. Delegate their authority to the Administrator or any authorized representative to maintain any legal proceedings necessary to protect the trust or the trustees or to secure payment of Employer contributions and liquidated damages for the trust or to effectuate the administration of the trust or the plan or to secure benefits contemplated hereby. In connection

therewith, the trustees or their administrator or representative may compromise, settle or release claims on behalf or or against the trust and/or the trustees;

* * *

ARTICLE X

Termination or Merger

Section 1. Continuance of Trust. The parties contemplate that new labor agreements may be entered into from time to time continuing the provisions of employer contributions for trust purposes. This trust shall continue during such period of time as may be necessary to carry out the provisions of the labor agreement. The termination of labor agreements or any of them without the extension or renewal shall not by itself terminate this trust, which shall

continue for a period time sufficient to wind up the affairs of the trust.

(Emphasis added.)

* * *

APPENDIX B

RULES AND REGULATIONS

PECA-IBEW Vacation and Holiday Plan

Section 1. Definitions: As used herein:

* * *

e. "Labor Agreement" means:

(1) The collective bargaining agreement effective May 1, 1969 between the Union and the Employers, and amendments, extensions or renewals thereof.

(2) Any other collective bargaining agreement between the Union and any employer or employer association which provides for contributions to the Fund.

f. "Employer" means any association, individual, partnership, corporation

or entity which employs employees and is a party to the labor agreement with the Union.

g. "Union" means Local Union No. 1186 of the International Brotherhood of Electrical Workers, AFL-CIO.

h. "Employee-Beneficiary" means a person covered by a labor agreement. It may mean a person who works for the Union, the Pacific Electrical Contractors' Association, or the PECA-IBEW Administrative Office, provided such inclusion does not jeopardize the tax-exempt status of the Fund.

i. "Earning Year" means September 1 of any year to August 31 of the succeeding year during which contributions are accumulated.

j. "Benefit Year" means September 1 of any year to August 31 of the succeeding year during which benefits are paid.

* * *

Section 8. Payment of Benefits.

a. Vacation Benefits. Subject to the application of an employee and the approval of the Trustees or its authorized representative, vacation benefits shall be paid to the employee in the Benefit Year when the employee takes his vacation. (Emphasis added.)

b. Holiday Benefits. (Eff. 8-15-76) No application for Holiday Benefits is necessary. Holiday Benefits shall be paid once a year to all employees before the month of December. (Emphasis added.)

Holiday Benefits for employees who are covered under a labor agreement requiring the employer to contribute 11.2% of the gross straight-time wages to the Fund are based on 14 holidays (New Year's Day, President's Day, Kuhio Day, Good Friday, Memorial Day, Kamehameha Day, Fourth of July, Labor Day, Discoverers' Day, Veteran's Day, Thanksgiving Day, day after Thanksgiving Day, Admission Day and Christmas Day.)

Holiday Benefits for employees who are covered under a labor agreement requiring the employer to contribute 7.2% of the gross straight-time wages to the Fund are based on 8 holidays (excluding Kuhio Day, Good Friday, Discoverer's Day, day after

Thanksgiving Day and Veteran's Day from the above-listed holidays).

* * *

PECA-IBEW SUPPLEMENTARY UNEMPLOYMENT BENEFIT PLAN

(as amended)

* * *

ARTICLE III. BENEFITS AND ELIGIBILITY

Section 1. Eligibility for Supplementary Unemployment Benefit. An Employee shall be eligible for a Supplementary Unemployment Benefit when he has met all of the following requirements:

a. He has registered at and has reported to an unemployment office maintained by the State Unemployment Benefit Program.

b. He has, within six weeks from his unemployment registered with the

referral agent as provided by the Labor Agreement and has not failed or refused to accept employment for a job covered by such Agreement which may be offered by such agent.

c. He is involuntarily separated from employment with his Employer as determined by the Rules & Regulations established by the Trustees, or he has received the State Unemployment Benefit, or he has received a certification that he is entitled to such Benefit for the week unless he has received the maximum benefit allowable under the State System whereupon only a. and b. above will apply. (Emphasis added.)

* * *